IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Case No. 6:15-CR-78
v.	)	
	)	
DAVID HERNON,	)	
	)	
Defendant.	)	

DEFENDANT HERNON'S
SENTENCING MEMORANDUM

COMES NOW Defendant, David Hernon, by and through his counsel, and hereby files this Sentencing Memorandum. This Memorandum is filed to aid the Court in imposing a sentence which is sufficient but not greater than necessary to serve the objectives of sentencing as set out in 18 U.S.C. § 3553(a). Mr. Hernon requests a sentence no greater than that recommended in the PSR, and consistent with the stipulations agreed to by the parties pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C).

I. INTRODUCTION

A. Proceedings in This Court

On January 25, 2016, Mr. Hernon appeared before the Honorable Magistrate Judge K. Nicole Mitchell, and pled guilty to a one-count information. The charge was perjury, committed in this district on March 6, 2014, in the trial of the case *LBDS Holding Company, LLC v. ISOL Technology, Inc., et al.*, Case No. 6:11-CV-428-LED.

B. **Related Proceedings in the Western District of Missouri**

The perjury charge lodged in this district is part of a multi-jurisdiction investigation and prosecution of numerous individuals, centered in the Western District of Missouri. These individuals including Mr. Hernon were also prosecuted in that district on a charge of conspiracy to commit wire fraud, in case no. 15-00379-01-CR, *United States of America v. Albert Davis, et al* (W.D. Mo.), before the Hon. David Kays, Chief Judge. The perjury charged in this case was also charged as an overt act in furtherance of the conspiracy. See Information, *United States of America v. David Hernon*, 15-00379-01-CR, Dkt. 3; ¶¶ 172-74.

On December 14, 2015, Mr. Hernon pled guilty to a one count information charging him with conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1343 and 1349. On April 25, 2017, Mr. Hernon appeared before Chief Judge Kays and was sentenced as follows:

- incarceration for 52 months;
- restitution to various victims in the total amount of $6,487,224.86, an amount stipulated to by the parties;
- Mr. Hernon permitted to self surrender at the facility designated by the Bureau of Prisons.

Through his plea, Mr. Hernon has accepted full and complete responsibility for his actions and knows that he will live the rest of his life with the consequences. There is no excuse for his conduct. The following remarks are respectfully offered as sentencing mitigators.

C. Mr. Hernon's Present Status

Mr. Hernon has been on pretrial release since he surrendered to authorities on December 14, 2015 in the Missouri proceeding. Chief Judge Kays allowed him to self report and he remains at liberty until June 16. He is on pretrial release in this district as well. Mr. Hernon has not violated any condition of pretrial release. He has continued gainful employment, made payments towards restitution, and has been a productive member of the community in which he resides. Mr. Hernon has appeared at all proceedings as required in both districts.

In order to prepare for his family to weather his 52-month period of incarceration, Mr. Hernon is now in the process of moving his family to Norfolk, Virginia, so that they might be closer to their support network. This is an important factor that may impact his designation and release back to the community.

Mr. Hernon is remorseful for his actions in this matter. Mr. Hernon has pled guilty in two different jurisdictions and has been available to the government, if necessary, to complete the investigation and prosecution of the lead defendant, and other indicted defendants whose cases have not as yet been resolved by plea. He knows the harm he has caused to his family, loved ones and friends. He has not, however, allowed the emotional weight of this situation win out over his resolve to remain a productive member of his community.

The Court has received Mr. Hernon's Presentence Report (PSR) and the advisory United States Sentencing Guidelines (USSG) calculations. In the instant case the PSR calculated the total offense level as 14, the criminal history category as I, with a guideline range of 15-21 months. The parties have lodged no objections to the PSR. The parties have stipulated, pursuant to Rule 11 (c)(1)(C), Federal Rules of Criminal Procedure, that the sentence imposed in this case shall run concurrently with the sentence imposed in the Missouri proceeding.

II. STANDARDS FOR IMPOSING SENTENCE

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined that district courts must consider all of the sentencing factors under 18 U.S.C. §3553(a)(1)-(7) without giving mandatory weight to the Guidelines. Post *Booker*, after determining the Guideline range and any permissible departures within the Guidelines structure, the court must determine whether a non-Guidelines sentence is appropriate. *United States v. Myers,* 503 F.3d 676, 684 (8th Cir. 2007).

Once the Court has calculated the correct guideline range, the Court then has a "responsibility to select a sentence that [is] sufficient, but not greater than necessary to comply with the statutory sentencing purposes." *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009) (quoting 18 U.S.C. § 3553(a)); see also *United States v. Butler*, 594 F.3d 955, 967 (8th Cir. 2010) (same).

As the Supreme Court has long recognized, "it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996).

As articulated in 18 U.S.C. § 3553(a), this Court is required to consider the following factors in imposing a reasonable sentence:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the sentencing Guidelines applicable to the offense; and
>
> (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (6) the need to provide restitution to any victim of the offense.

III. SENTENCING FACTORS

1. Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

a. Circumstances of the Offense

As detailed in the PSR at ¶¶ 5-15, Mr. Hernon committed perjury in the trial of the case *LBDS Holding Company, LLC v. ISOL Technology, Inc*. He accepts full and complete responsibility for his actions.

Mr. Hernon further acknowledges that he participated in a conspiracy to commit mail and wire fraud, as charged in the Missouri proceeding. Overt acts in furtherance of the conspiracy were committed by the various defendants in the Western District of Missouri, the Eastern District of Texas, and other districts. This is important because the offense conduct in this case, Mr. Hernon's perjury, was also part of the relevant conduct in the conspiracy charged in the Western District of Missouri. See Information, *United States v. David Hernon*, 15-00379-01-CR, Dkt. 3; ¶¶ 172-74.

b. Characteristics of David Hernon

Mr. Hernon is 56 years old. He has been married to his wife for 33 years. He is the father of two daughters and is the sole provider of support for his wife and youngest daughter. He has had no other unrelated criminal history which is discussed more fully in this memorandum.

Mr. Hernon was born in Newport, Rhode Island, and was raised in a military family. His father served in the U.S. Navy, and he and his three siblings moved to many different parts of the country. He remains close with both of his parents and his siblings.

Mr. Hernon recognizes the damaging effects that his conduct has had on the victims of his actions, himself, and his loved ones. He enjoys the support and encouragement of friends and family members who both hold him accountable and support his efforts to continue to be an active and productive member of his community. To that end, Mr. Hernon and his wife recently incorporated The Harder Right, an educational nonprofit organization focused on ethical decisions in business and public service. The Harder Right will provide educational information to organizations whose employees may benefit from Mr. Hernon's experiences. Mr. Hernon's willingness to publicly acknowledge his wrongdoing in this way speaks highly of his character and further demonstrates his acceptance of responsibility and remorse.

Mr. Hernon's conduct is completely at odds with his personality and actions as observed by his family and acquaintances, several of whom have written letters of support for this court's consideration at sentencing. Without exception, all of the letter writers hold Mr. Hernon in high regard. His sister wrote about Mr. Hernon's protective nature. She stated, "He set high goals for himself that included getting accepted to West Point. Throughout our childhood and our school years my brother was the person I would look to for advice and guidance. That has continued into adulthood." She went on to express that her brother's decision to accept responsibility for his conduct in this case was not surprising to her. "Dave is full of integrity and responsibility."

Another sister wrote of growing up in a military household with a father who was often deployed for many months at a time. She described her brother as "always helping our mom with babysitting and household repairs." She described Mr. Hernon as "responsible and dependable."

A longtime friend of Mr. Hernon's also wrote to the Court about conversations with him about this offense. "When David and I have spoken about his current situation, he has told me more than once how much he regrets his actions and wishes he had it to do differently all over again." He went on to recall how Mr. Hernon's attendance at and graduation from West Point, "…inspired me to a life of public service in the Air Force and as a civilian in the Department of Defense."

Mr. Hernon is a loving, caring, compassionate person, willing to assume responsibilities for the betterment of others – without fanfare or the expectation of public accolades. He is a positive force, integral to his family and the community at large.

1. **B. 18 U.S.C. § 3553(a)(2) – The Need for the Sentence Imposed to Promote Certain Statutory Objectives.**

    a. **To Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment for the Offense.**

A lengthy sentence of incarceration is not always necessary in order to satisfy this sentencing mandate. Indeed, as observed by the District Judge in *Gall*, probation (or post-release supervision), "rather than an act of leniency, is a substantial restriction of freedom." *Gall v. United States*, 128 S. Ct. 586, 593 (2007). *Gall* emphasized that the defendant would have to "comply with strict reporting conditions along with a [multi]-year regime of alcohol and drug testing." *Id*. The Court also noted that the defendant would "not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court." *Id*.

Mr. Hernon concedes that he must be punished for his actions. However, this punishment should be proportional not only to the social harms caused by his conduct, but also to the social harms caused by depriving him of his liberty for any substantial period of time. Mr. Hernon will forever have federal felony convictions on his record, a stigma that has serious consequences.

b. To Afford Adequate Deterrence to Criminal Conduct, and
c. To Protect the Public from Further Crimes of the Defendant.

For similar reasons, the sentence recommended in the PSR also satisfies the related statutory objectives of deterrence and protection of the public. The fact that Mr. Hernon was investigated, and then approached the government and pled guilty to a federal felony in two jurisdictions, agreeing to a significant amount of restitution, and consenting to a restitution judgment, is a deterrent in and of itself. The lifelong stigma of being a federal felon, regardless of any sentence imposed, acts as a deterrent to other similar individuals contemplating this type of fraud.

d. To Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or other Correctional Treatment in the Most Effective Manner.

Mr. Hernon graduated from Bethel High School in Hampton, Virginia in 1979. Upon graduation, he entered the U.S. Military Academy at West Point, New York, where he graduated with a Bachelor of Science degree in nuclear engineering in 1983. In 1987, Mr. Hernon received an honorable discharge from the Army at the rank of Captain and then served two additional years in the North Carolina National Guard. Mr. Hernon then obtained his master’s degree in business administration from the University of North Carolina in 1995. Mr. Hernon has been gainfully employed. This section is a mitigating factor in favor of Mr. Hernon.

18 U.S.C. § 3553(a) also requires a court to consider the following:

2. **The kinds of sentences available.**
3. **The sentencing Guidelines applicable to the offense.**
4. **The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct**

All of the above-referenced factors can best be satisfied with a reasonable custodial sentence. Mr. Hernon has been available and willing to assist the government should other defendants decide to proceed to trial.

5. **The Need to Provide Restitution**

In the Missouri proceeding, Mr. Hernon was ordered to make restitution in the amount of $6,487,224.86. His ability to make restitution is tied to his ability to work and earn income to pay toward this significant debt.

It should be noted that to date, Mr. Hernon has made monthly restitution payments since February 2017 and has deposited $3,000.00 with the Clerk of the Court to be applied to the restitution judgment. He intends to make additional payments of $1,000.00 per month while on self-surrender status.

IV. CONCLUSION

Given all of the 18 U.S.C. § 3553(a) statutory sentencing factors discussed herein, a sentence of no greater than 15 months, concurrent with the sentence imposed in the Western District of Missouri, would adequately reflect the seriousness of Mr. Hernon's offense; promote respect for the law; and provide just punishment.

In the Missouri proceeding, Chief Judge Kays recommended placement of Mr. Hernon at the FPC Petersburg in Hopewell, Virginia, and permitted him to self surrender at the facility designated by the Bureau of Prisons. Mr. Hernon respectfully requests that this Court likewise recommend placement at Petersburg/Hopewell and allow him to self surrender there by June 16.

Finally Mr. Hernon asks this Court to impose no fine for the same reason that Chief Judge Kays declined to do so in Missouri – any further financial obligation will simply impair his future ability to make restitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of May, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Robert Kelly Pace
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